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No. 178

IN THE

Supreme Court of the United States

October Term, 1958

SS MONROSA, HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, *Petitioners*

-VERSUS-

CARBON BLACK EXPORT, INC., *Respondent*

ON WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONERS

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Citations To Opinions Below

The memorandum opinion of the United States District Judge is unreported and appears at R. 36-37. The opinion of the Court of Appeals for the Fifth Circuit (R. 46-52) is reported at 254 F. 2d 297.

Jurisdiction

The judgment of the Court of Appeals was entered April 18, 1958. (R. 52). The petition for a writ of certiorari was filed July 16, 1958, and was granted October 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

Questions Presented

I. Is a clause in a foreign shipowner's bill of lading in which Respondent (cargo owner) and Petitioner (vessel owner) agreed to adjudicate claims for damage to cargo in the Courts of Genoa, Italy, a valid and enforceable agreement?

II. If such agreement is valid, did the agreement of Respondent and Petitioner here include *in rem* actions against the vessel itself?

Statement

Invoking the admiralty and maritime jurisdiction of the United States, Respondent, Carbon Black Export, Inc., filed its original libel (R. 4-11), alleging the issuance of bills of lading by the Petitioner, covering a cargo of carbon black loaded at Houston, Texas, and New Orleans, Louisiana, in December, 1955, aboard the SS MONROSA, a vessel owned and operated by the Petitioner, and flying the Italian flag. This cargo was to be transported to the Italian ports of Genoa, Naples, Venice and Trieste. These bills of lading constituted the contract for carriage of this carbon black between Petitioner and Respondent. The cargo was damaged upon its arrival in Genoa, Italy, where it was discharged.

The libel (R. 4-11) both *in rem* against the MONROSA and *in personam* against Petitioner, prayed for damages

allegedly sustained by the Respondent by virtue of the damage to the cargo in the amount of $110,000.

To obtain security for its claim, Respondent had a warrant of seizure issued against the SS MONROSA at Houston, Texas, in connection with the *in rem* portion of the libel, and to obtain release of its vessel Petitioner filed a Stipulation to Abide Decree (R. 12) on April 9, 1956, and as is customary in admiralty matters, Petitioner likewise on the same day filed its Notice of Appearance (R. 49) and Claim of Owner (R. 50), incorrectly designated in the certified transcript of record as Claim of "Order".

The bill of lading (R. 20), the contract between the parties, contained certain express agreements embodied in Clauses 27, 28, 29 and 32 thereof,[1] that no legal proceedings

[1] "Clause 27—Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

"Clause 28—Also, that this contract is governed by the law of the steamer, carrying the goods, but any average that may arise on the voyage to be adjusted according to conditions named on the reverse side."

"Clause 29—Also, that in regard to all and everything which is not regulated and provided for in the present contract of transport, the regulation of the Italian Commercial Code will be in vigour."

"Clause 32—This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights of immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such terms shall be void to that extent, but no further."

for loss or damage to the cargo would be brought by Respondent except in Genoa, Italy. Petitioner, in its Motion to Decline Jurisdiction (R. 14-20), while recognizing and acknowledging the basic Admiralty jurisdiction of the United States District Court, moved the Court to exercise its jurisdiction by granting specific performance of the agreement in the bills of lading to adjudicate the Respondent's damage claim in Genoa, Italy.

On July 27, 1956, Petitioner (Respondent in the admiralty action in the District Court) filed its Motion to Decline Jurisdiction (R. 14-20), and attached as part of its Motion to Decline Jurisdiction a photostatic copy of Bill of Lading No. 7 (R. 20), covering twenty-five bags of the cargo of carbon black loaded on the MONROSA at Houston for delivery to Genoa, Italy. A total of twenty-seven bills of lading were issued, as the libel (R. 4-11) alleges, and all of the printed terms thereon are identical to Bill of Lading No. 7 (R. 20).

The Respondent, Libellant below, filed the Affidavit of Carl G. Stearns in opposition to the Motion to Decline Jurisdiction (R. 21-28) on September 21, 1956.

In support of its Motion to Decline Jurisdiction (R. 14-20), Petitioner filed on October 2, 1956, the Affidavit of E. D. Vickery in support of the Motion to Decline Jurisdiction (R. 29-32).

The District Court granted the Motion to Decline Jurisdiction and filed its Memorandum Opinion on December 31, 1956, (R. 32) on the ground that the agreement to adjudicate cargo claims only in Genoa was not shown to be an unreasonable one. The District Court relied on the decision of the United States Court of Appeals for the

Second Circuit in *William H. Muller & Co. v. Swedish American Line, Ltd., et al.*, 224 F. 2d 806 (2 C. A.), cert. denied 350 U.S. 903 (1955). However, in order to preserve the security which Respondent had acquired by its seizure of the vessel and the posting by Petitioner of a release bond (R. 12) with surety in the amount of $100,000, the court conditioned its order sustaining the Motion to Decline Jurisdiction on delivery by Petitioner to Respondent of a good and sufficient bond in the same principal sum guaranteeing the payment of any final judgment that might be had in favor of Respondent against Petitioner's ship, the SS MONROSA, and further requiring that said bond be kept in effect by Petitioner until termination of the controversy involved in this suit. Such bond was executed, approved by Respondent's proctors, and timely filed and delivered (R. 33-36).

While the Motion was being considered by the District Court, Petitioner granted Respondent an extension of time in which to sue in Italy, since limitations was about to run. Subsequent to the District Court's decision in this action a suit has actually been filed by Respondent against Petitioner and its vessel in Genoa, Italy for this same cargo damage.

Upon appeal, the United States Court of Appeals for the Fifth Circuit reversed and remanded this cause to the District Court. The Court of Appeals based its reversal on two grounds:

1. That the agreement to adjudicate claims in Genoa was void because contrary to public policy, and

2. That the agreement did not include *in rem* actions against the vessel itself as well as *in personam* actions against Petitioner.

Petitioners submit that such reversal was clearly in error.

SUMMARY OF ARGUMENT

I. In Clause 27 of the bills of lading covering the cargo involved in this case, the Petitioners and Respondent mutually agreed that all claims for any loss or damage to this cargo would be adjudicated in the Courts of Genoa, Italy.

The Court of Appeals below erroneously interpreted this clause of the bill of lading to be an agreement ousting the court of jurisdiction and therefore held it to be contrary to public policy.

In so doing, the Court of Appeals below completely misinterpreted the nature of the motion filed by Petitioners which specifically requested the District Court below to exercise its basic Admiralty jurisdiction and enforce Clause 27 of the bills of lading by requiring Respondent to assert its cause of action against Petitioners in the agreed upon forum in Genoa, Italy. Petitioners acknowledged the basic Admiralty jurisdiction of the District Court below and sought specific enforcement of one of the provisions in the bill of lading covering the cargo allegedly damaged.

Such clauses providing for legal proceedings in an agreed upon forum have previously been held in three separate de-

cisions by the Court of Appeals for the Second Circuit[2] not to be agreements ousting a Court of jurisdiction but valid contractual agreements between the parties which the Courts would enforce so long as the agreement was a reasonable one.

That such an agreement to adjudicate claims for cargo damage in a particular forum is not contrary to the public policy of the United States was clearly indicated by the approach taken to this matter by the Congress of the United States when it passed the United States Carriage of Goods by Sea Act in 1936[3] and ratified the Brussel's Convention April 1, 1935 (with one understanding) and May 6, 1937 (with a second understanding).[4] In passing the United States Carriage of Goods by Sea Act, Congress did not grant exclusive jurisdiction to any particular court or courts nor did it enact any provisions relating to venue. Exclusive jurisdiction clauses had been placed in the Australian and Canadian Carriage of Goods by Sea Acts of which Congress was well aware. The omission of any exclusive jurisdictional provision in the United States Carriage of Goods by Sea Act was a clear indication that in the opinion of the Congress the public policy of this country did not require such a provision. The public policy of this country, in fact, strongly requires that no such exclusive jurisdictional provision be placed in the Carriage of Goods

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[2] **William H. Muller & Co. v. Swedish American Line, Ltd., et al.**, 224 F. 2d 806 (2 C.A.), cert. denied 350 U.S. 903 (1955); **The Geisha-Cerro De Pasco Copper Corp. v. Knut Knutsen**, O.A.S., 187 F. 2d 990 (2 C.A., 1951); **Murillo, Ltd., et al. v. The Bio Bio, et al.**, 227 F. 2d 519 (2 C.A. 1955), aff. 127 F. Supp. 13 (S.D. N.Y. 1955).

[3] 46 U.S.C. 1300 ff.

[4] Knauth on Ocean Bills of Lading (4th Ed. 1953), pp. 77-85.

by Sea Act, for in its present form it gives encouragement to American shippers to ship aboard American vessels rather than foreign vessels. When American vessels are used, all cargo claims are assertable in the United States and the fact that shippers aboard foreign vessels will be required to litigate their claims for loss or damage in foreign countries will strongly influence those shippers to ship aboard American flag vessels and thus bolster the American Merchant Marine which is heavily subsidized by the United States Government for its very existence.

With Congress not having directly declared an agreement to adjudicate a claim for cargo damage in a foreign country to be invalid and contrary to the public policy of this country, and it clearly appearing that the public policy of this country would best be served by giving every possible encouragement to American shippers to ship aboard American vessels, the declaration of the invalidity of an agreement such as is involved here to adjudicate claims in a foreign country as being contrary to public policy should in as important a field as Admiralty and Maritime law await specific action by the Congress and not be accomplished by a court decision.

II. Since the agreement to adjudicate claims for cargo damage in Genoa, Italy is not contrary to public policy if it is a reasonable one, the reasonableness of the agreement as determined by the District Court below is clear.

After a carful consideration of all of the factors involved in this case, the District Court below concluded that the agreement to adjudicate claims relating to cargo damage in Genoa, Italy was not an unreasonable one. This finding by the District Court below cannot be set aside

unless it is clearly shown that his finding that the agreement was not an unreasonable one was an abuse of discretion or was clearly erroneous. It has never been seriously asserted by Respondent and cannot be that this decision by the District Court below was an abuse of its discretion in exercising its basic Admiralty jurisdiction or that it was clearly erroneous.

While obviously there are some factors which might indicate that some evidence would have to be obtained in this country, it is clear that substantially all of the most material and important evidence must be obtained from records or witnesses residing in Italy, the agreed upon forum,

Under all of the facts and circumstances, the District Court below did not abuse its discretion in enforcing the contractual agreement made by Petitioners and Respondent to adjudicate claims such as those asserted in this action in the Court of Genoa, Italy.

III. The Court of Appeals below also held that the agreement here involved did not cover *in rem* actions against the vessel itself as well as *in personam* actions against the vessel owner.

The clear intent of the agreement was to cover legal proceedings of any kind in connection with cargo damage. It therefore prevents *in rem* actions against Petitioner's vessel as well as *in personam* actions against Petitioner. To permit Respondent to prosecute its cause of action against the vessel *in rem* and to uphold the agreement not to permit the libel *in personam* against Petitioner is to permit Respondent to circumvent its agreement by extending the separate identity of a vessel to never intended

extremes. The existence of a lien against a vessel is merely a security device in a cause of cargo damage and Respondent has acquired all the security it could ever obtain by the corporate surety bond on file in the United States District Court in Houston, which stands as security for any decree Respondent may obtain in its suit in Genoa, Italy.

To permit the divorcing of the *in rem* proceeding as completely as did the Court of Appeals below is not only contrary to decisions of the Courts of Appeals of the Second and Third Circuits, but to an earlier decision of its own.[5]

This contention of Respondent is but an ingenious device now advanced in an attempt to evade its agreement to institute this action in the courts of Genoa, Italy, which agreement it now considers to be an unwise one.

ARGUMENT

Agreement To Litigate Claims In Italy Is Not Contrary To Public Policy

In Clause 27 of the bills of lading, Petitioners and Respondent mutually agreed that all claims for any loss or damage to the cargo covered by the bills of lading would be adjudicated in the Courts of Genoa, Italy.

The District Court below, accepting jurisdiction as it had to do, in its discretion determined that this agreement to adjudicate claims in Genoa, Italy, was not an unreason-

[5] **Smith v. The Mormacdale**, 198 F. 2d 849 (3 C.A. 1952); **Bennett v. SS. Mormacteal, et al.**, 254 F. 2d 138 (2 C.A. 1958), certiorari denied Oct. 13, 1958; and **Samuels v. Munson Steamship Line**, 63 F. 2d 861 (5 C.C.A. 1933).

able one and entered an order directing the Respondent to comply with its contractual agreement and adjudicate its claim for damage to the cargo covered by the bills of lading in Genoa, Italy.

The Court of Appeals below erroneously interpreted this clause in the bill of lading to be an agreement ousting the court of jurisdiction and therefore contrary to public policy. Its reversal of the District Court's decision rested primarily on this ground.

The Court of Appeals below thus completely misinterpreted the nature of the motion filed by Petitioners requesting the District Court to enforce Clause 27 of the bills of lading. As Petitioners readily acknowledged and admitted both in the District Court below and the Court of Appeals below, there has never been and there is not now, any question but what the District Court had basic jurisdiction in admiralty over the cause of action as alleged in the Respondent's original libel. Petitioners have not, and do not now contest the basic Admiralty jurisdiction of the courts of the United States in this matter, but in fact continue to seek now, as they did in the District Court, the exercise of that basic jurisdiction by the courts of the United States to secure the specific enforcement of one of the provisions of the contract of carriage that all claims for cargo damage such as are involved in this case must be asserted in the courts of Genoa, Italy.

Unless Clause 27 of the contract of carriage is null and void as contrary to public policy as the Court of Appeals below held, Petitioners are entitled to have the courts of the United States compel the Respondent to live up to its contractual agreement and litigate this case in the agreed upon forum.

Thus, the Petitioners have not, and do not now contest the basic Admiralty jurisdiction of the courts of the United States in this case but simply have requested that these courts in the exercise of their sound discretion give effect to the contractual agreement of the parties since it is not an unreasonable one.

Agreements such as the one here involved in Clause 27 of the bills of lading prior to the filing of Petitioners' original motion properly had been held not to be clauses ousting a court of jurisdiction as the Court of Appeals below held, but as a binding contractual agreement between the parties which the courts would enforce in three separate decisions by the Court of Appeals for the Second Circuit. When Petitioners moved for an enforcement of this contractual agreement, they confessed the District Court's basic Admiralty jurisdiction and simply asked for enforcement of the contractual agreement between the parties as was done by the Court of Appeals for the Second Circuit in the following three cases:

The Geisha-Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S., 178 F. 2d 990 (1951);
William H. Muller & Co. v. Swedish American Line, Ltd., et al., 224 F. 2d 806 (1955), cert. denied 350 U.S. 903 (1955);
Murillo, Ltd., et al. v. The Bio Bio, et al., 227 F. 2d 519, Aff. Per Curiam, 127 F. Supp. 13 (S.D.N.Y., 1955).

In the *Geisha* the Court of Appeals for the Second Circuit said in part:

"At any rate, the District Court here did exercise jurisdiction to decide, in its discretion, whether it was

> the appropriate forum to hear the case on the merits."[1]
> "Footnote 1 - It might be said that the Court took jurisdiction and granted specific performance of Clause 12 of the bill on the grounds that the provision was fair and not against public policy, all the facts considered."[6]

In the *Muller* case the Court of Appeals for the Second Circuit adhered to its ruling in the *Geisha* in the following language:

> "We agree with the Appellant to this extent: The parties by agreement cannot oust a Court of jurisdiction otherwise obtaining; notwithstanding the agreement, the Court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling, the Court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented."[7]

It was recognized in these well-reasoned decisions that agreements such as the one involved in this case have been criticized and attacked as being contrary to public policy. However, modernizing the outmoded reluctance of Courts to uphold freedom of contract in this respect, in the *Muller* case the Court of Appeals for the Second Circuit stated:

> "It is further contended that the enforcement of this clause would be in contravention of public policy. It is true that there has been much difference of opinion over the validity of contractual provisions which purport to limit a jurisdiction which would otherwise

[6] 187 F. 2d 990, at page 991.

[7] 224 F. 2d 806, at page 808. Cert. Denied 350 U.S. 903 (1955).

attach. The law has long viewed such agreements askance. This can be readily seen by comparing Section 558 of the Restatement of the Law of Contracts with Section 617 of the Restatement of Conflicts of Law. For a general discussion of the older law, see also Insurance Co. v. Morse, 20 Wall 445, 87 U.S. 445, 22 L. Ed. 365; 45 Yale Law Journal 1150; 22 Cornell Law Quarterly 456; 6 Corbin on Contracts, Section 1445.

(2) However, we accept the conclusion of Judge L. Hand stated in his concurring opinion in the Krenger Case, supra (174 F. 2d 561), viz:

'In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement (of Contracts, Section 558) they are invalid only when unreasonable; and Mittenthal vs. Mascagni (183 Mass. 19, 66 N.E. 425, 60 L.R.A. 812), is a notable instance in which a contract in futuro was held 'reasonable'. What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist.'

From this it follows that in each case the enforceability of such an agreement depends upon its reasonableness."[8]

The District Court below found the agreement to adjudicate claims for cargo damages in Genoa, Italy was not an unreasonable one and thus enforced the agreement made between the parties to litigate in that forum. The respondent here was amply protected from any unjust or unreasonable results by the careful consideration of the District Court below of the question of the reasonableness of the agreement. Exercising its basic Admiralty jurisdiction

[8] 224 F. 2d 806, at page 807.

as requested by Petitioners, the District Court below in the exercise of its sound discretion determined that the agreement made by the Respondent to adjudicate these claims in Genoa was not an unreasonable one and thus directed specific performance of one of the contractual provisions covering the shipment.

That such an agreement in a bill of lading is not contrary to the public policy of the United States is clearly indicated by the approach to this matter taken by the Congress of the United States when it passed the United States Carriage of Goods by Sea Act in 1936[9] and ratified the Brussels Convention in 1935 and 1937.[10]

In passing the Carriage of Goods By Sea Act, Congress did not see fit to declare such agreements as this to be invalid and the Act contains no grant of jurisdiction to any particular courts nor does it contain any provisions relating to venue. In discussing the effect of the Congress not having included some specific grant of jurisdiction to the courts of the United States, the Court of Appeals for the Second Circuit in the *Muller* case expressly pointed out that such agreements were not contrary to the Carriage of Goods by Sea Act saying in part:

> "It will be noted at the outset that this section does not[11] expressly invalidate the jurisdictional agreement contained in the bill of lading here involved. Nor, we

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[9] 46 U.S.C. 1300 ff.

[10] Knauth on Ocean Bills of Lading (4th Ed., 1953) at pages 77-85.

[11] Refers to section 3(8) of the U. S. Carriage of Goods by Sea Act, 46 U.S.C.A. 1303 (8).

hold, may the Act [12] properly be interpreted to invalidate such agreements. It is perhaps worth noting that the present Australian Carriage of Goods by Sea Act does declare provisions of the sort here involved to be null and void. Formerly the Canadian Act did likewise. Knauth on Bills of Lading, p. 238. We think that if Congress had intended to invalidate such agreements, it would have done so in a forthright manner, as was done in the Canadian Act of 1910. The Carriage of Goods by Sea Act contains no express grant of jurisdiction to any particular courts nor any broad provisions of venue: in this respect it differs from the Federal Employers' Liability Act which was involved in Krenger v. Pennsylvania R. Co., 2 Cir., 174 F. 2d 556. On that account, as indeed in other respects, this case must be distinguished from that. Certainly the clause here involved is not one necessarily 'relieving the carrier or the ship from liability.' "[13]

The Carriage of Goods by Sea Act is, of course, a direct indication by the Congress of the United States that it did not intend to invalidate such agreements, for as the Court of Appeals for the Second Circuit pointed out had Congress intended that such an agreement to adjudicate claims in foreign countries would be null and void as the Court of Appeals below held, this could have easily been taken care of by an express provision in the Act as it had been done by the legislative bodies of Australia and Canada in enacting their Carriage of Goods by Sea Acts. It is therefore of particular significance that a provision invalidating agreements to adjudicate claims in courts outside the U. S.

[12] Refers to U. S. Carriage of Goods by Sea Act, 46 U.S.C.A. 1300 ff.

[13] 224 F. 2d 806, at page 807, cert. denied 350 U.S. 903 (1955).

was not included in the United States Carriage of Goods by Sea Act by the Congress of the United States.[14]

We firmly believe that this was not an unintentional omission by the Congress of the United States in passing the Carriage of Goods by Sea Act, for the legislative history shows notably that Congress was aware of possible litigation in both American and foreign courts [14a] but that Congress was striving for substantial uniformity with similar acts of other great maritime countries when it enacted the U. S. Carriage of Goods by Sea Act. Such uniformity required no provision invalidating agreements to adjudicate claims in courts outside the United States for only Australia and Canada had such provisions in their Acts and Canada was in the process of repealing that provision in its Carriage of Goods by Sea Act at approximately the

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[14] The legislative history of the U. S. Carriage of Goods by Sea Act shows clearly that Congress was well aware of similar Acts in many other countries including Australia and Canada. See the repeated references to the need for uniformity and to the Carriage of Goods by Sea Acts of many other countries or to said countries having ratified the Brussels Convention in H. R. Rep. No. 2218, 74th Cong., 2d Sess. (Jan. 28, 1936), **Hearings Before the House Committee on Merchant Marine and Fisheries on S. 1152, Uniform Ocean Bills of Lading;** S. Rep. No. 742, 74th Cong. 1st Sess. (1935), **Hearings Before the Senate Commerce Committee on S. 1152, a Bill Relating to Carriage of Goods by Sea,** 74th Cong. 1st Sess. 1935, particularly at pages 18, 20, 77. The Acts of other countries were matched so closely that even clerical errors were corrected as is shown on page 3 of the Senate report.

[14a] The House Report in quoting from the Senate Report states: "This legislation supplements the convention in that it makes the convention provisions surely applicable to all carriers engaged in American trade when they are before American courts". This indicates that both the House and the Senate contemplated litigation of claims such as this in both American and foreign courts. See H. R. Rep. No. 2218, 74th Cong. 2nd Sess. (1936) at page 4.

same time that Congress was passing the United States Carriage of Goods by Sea Act.[15]

But Congress undoubtedly had an even stronger reason than uniformity for omitting any provision granting exclusive jurisdiction to the courts of the U. S.—and that simply was to encourage, in every way that it could, American shippers to ship their goods on vessels in the American Merchant Marine. Such encouragement would serve a two-fold purpose—it not only would help to insure an adequate Merchant Marine quickly convertible to war time use in an emergency, but it would also serve to reduce the amount needed in governmental subsidies to American steamship companies.

The position Respondent now finds itself in in this case will undoubtedly encourage it in the future, if indeed it has not already done so, to ship its goods on American vessels. If living up to its contractual agreement to litigate this case in Genoa, Italy is as distasteful to Respondent as it has made it out to be in these proceedings, we have no doubt that whenever possible it will ship its goods on American vessels where it has a choice as it did in this case. As the record reflects, at least one wholly owned American steamship company, Lykes Bros. Steamship Co., Inc., maintained a regular service with vessels sailing from United States Gulf ports to the ports in Italy involved here each two weeks at precisely the time Respondent was shipping its goods on Petitioner's vessel. If Respondent had wanted to insure that its cargo claims, if any, would have been litigated in the United States, its choice was very simple—

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[15] As Schedule to Canadian Water Carriage of Goods Act of June 23, 1936, repealing Act of 1910.

simply ship on American flag vessels which provide for adjudication of claims such as this in the courts of the United States in their bills of lading.

It is respectfully submitted that public policy requires that everything be done that will best serve the interests of this county and its citizens. Without question, these interests are best served by encouraging American shippers to ship with vessels in the American Merchant Marine, already heavily subsidized by the United States Government for its very existence.

To permit an American citizen who has elected to use a foreign vessel on which to make its shipments to ignore its contractual agreement with that foreign vessel to litigate any claims it might have in Italy would only serve to encourage American shippers to ship on foreign flag vessels. On the contrary, however, if full effect is given to the agreement in Clause 27 of the bills of lading in this case and the Respondent relegated to the courts of Genoa to which it freely assented, it will undoubtedly serve as a substantial impetus to American shippers to ship their goods aboard American flag vessels in order to insure that any claims for damage to their shipments will be adjudicated in this country.

With the Congress not having declared agreements such as this contrary to public policy, and it clearly appearing that public policy would best be served by encouraging American shippers to ship aboard American vessels, it is respectfully submitted that any declaration that such agreements are invalid as being contrary to public policy should come from the Congress and not from the courts. Particularly is this true when the possible international im-

plications such a decision will have on our world trade and when the disrupting effect it will have upon the uniformity of international maritime law are carefully considered.

AGREEMENT TO LITIGATE CLAIMS IN ITALY WAS A REASONABLE ONE

If the agreement to adjudicate claims for cargo in Genoa is not null and void because contrary to public policy as the Court of Appeals below held, then the agreement of the parties must be given effect if the agreement is a reasonable one.

While the Court of Appeals below attempts to distinguish on the facts the holdings of the Court of Appeals for the Second Circuit in the *Muller* case,[16] *The Geisha* case[17] and *The Bio Bio* case,[18] a comparison of the factors which led the Court of Appeals for the Second Circuit to enforce the agreements to adjudicate the claims in foreign countries as reasonable in its three cases demonstrates clearly that the factors involved in this case are substantially the same. A comparison of the decisions in the three cases from the Court of Appeals for the Second Circuit with the facts of this case indicates quite clearly that the only reasonable forum for the adjudication of this controversy is a court in Genoa, Italy. When the factors indicating the reasonableness of the present agreements are considered, the so-called distinguishing factors

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[16] 224 F. 2d 806 (2 C.A.), cert. denied, 350 U.S. 903 (1955).

[17] 187 F. 2d 990 (2 C.A., 1951).

[18] 227 F. 2d 519 (2 C.A., 1955), aff. 127 F. Supp. 13 (S.D. N.Y. 1955).

advanced by the Court of Appeals below in its attempt to distinguish this case from the three decisions of the Court of Appeals for the Second Circuit pale into insignificance. For the Court's convenience, these factors are set out at length in the footnote below.[19]

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[19] These factors are:

1. The vessel is owned by a Genoese corporation and its operations are directed therefrom. All records of the corporation relating to the vessel and its cargo are located there.

2. The vessel's crew are Italians, residing in Italy, and as possible witnesses, have no expectation of being in the United States at the time of trial. Since the voyage referred to in the Libel, the Captain of the vessel, patently an indispensable witness, has suffered a heart attack and is no longer aboard the vessel. No information is available in the record as to the whereabouts of other crew members or even whether they are still in the employ of Petitioner. Employment as a member of the crew of a vessel is characteristically transitory in nature, and certainly it is only the rankest kind of speculation to say that one or any of the MONROSA's foreign crew were aboard at the times mentioned and certainly it cannot be expected that they would be present at the time of trial in the United States where their oral and obviously more effective testimony could be obtained. This is true notwithstanding the fact that the MONROSA and other of the Petitioner's ships on occasions call at Gulf ports with crews aboard. At any rate, the MONROSA's crew is Italian and it resides in Italy and the obvious benefit of this factor and the probability that they would be available at the time of trial in Genoa is apparent. Certainly, their presence would be more desirable to a court than deposition testimony.

The fact that deposition testimony could have been obtained from the MONROSA's crew in April or in September of 1956 (assuming the personnel other than the Master was the same) should not influence the decision in this case, since the District Court ruled that Respondent who served notice for the taking of depositions two days after the filing of the Libel with no advance notice was not entitled to this deposition testimony when it was sought. In this connection, the District Court ruled after hearing oral argument that the notices to take depositions had to be vacated; first, because discovery depositions are not author-

It is clear from a consideration of these factors that the finding of the District Court below that the agreement

ized in admiralty, and second, because depositions **de bene esse** cannot be taken before issue is joined. The Libel had been filed only two days before the notices of depositions were served and no responsive pleading was due for more than nine days after the depositions had been noticed. In any event, it would have been quite unjust to permit the depositions when Petitioner's counsel did not have, and could not obtain from Italy, full information on the facts of the case before the depositions were scheduled.

It is entirely possible that Respondent was not primarily concerned with obtaining the testimony of these witnesses on the merits of the claim, but, on the contrary, to attempt to bolster its contentions in opposition to Petitioner's motion to decline jurisdiction in an effort to avoid the agreement it had previously made to adjudicate claims in Genoa, Italy.

3. Of the four Italian ports listed where the carbon black was destined, Genoa was the first port reached by the SS MONROSA and it was there that all of the cargo that was capable of being delivered was discharged, the remainder being damaged to such an extent that it could not be delivered to the other Italian ports. Therefore, it was at Genoa, the place agreed upon for the adjudication of any cargo damage claims in the bills of lading, where the cargo was discharged and surveyed, the damages segregated and the condition of the cargo noted, not only by Petitioner's representatives but by Respondent's representatives as well.

4. Clause 8 of the bills of lading provides that in the event of claims for short delivery and damage, the value of the cargo shall be determined as of its market value at the port of destination on the day of the vessel's arrival in the Italian port (Genoa). Accordingly, testimony as to the market value will have to be obtained exclusively in Genoa, Italy. This measure of damages (the value of the cargo at the port of destination on the date of its arrival) is the same measure as applied in courts of admiralty in the United States.

5. The Libel alleges damages to the cargo by seawater. Accordingly, the seaworthiness of the vessel before, at the beginning of, and during the course of the voyage will be one of the main

to adjudicate cargo claims in Genoa, Italy was not an unreasonable one is amply supported by the record. It must be accepted here unless there was a clear abuse of the

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issues in this case. All repairs and surveys of the vessel, both before the voyage in question and following its completion, were performed in Italy, and therefore all evidence and testimony regarding the inspections, repairs and seaworthiness in general will be available to the Italian Court in Italy, and not here. Testimony respecting the seaworthiness of the hull of the SS MONROSA when it departed Houston and New Orleans is primarily obtainable from Italian surveyors and from the crew of the SS MONROSA, since no complete hull survey of the MONROSA's cargo holds were made by American surveyors at Houston and New Orleans prior to the vessel's departure on the voyage in question.

Petitioner has the burden of showing that it used due diligence to make the vessel seaworthy when the cargo was loaded in Houston and New Orleans, but while there may be some testimony on this issue available in Houston and New Orleans, the vast majority of it will have to come from the ship's crew, from the vessel's records in Italy and from Italian surveyors who had made periodic checks of the vessel's hull prior to this voyage and subsequent thereto.

6. General Average has been declared in Italy and all computations required in the adjudication thereof is being accomplished in Italy. Whether this is a general average situation or not is a matter that also must be resolved possibly by litigation in Italy.

7. Respondent did not have to accept the agreement to adjudicate the claims in Genoa because of economic duress because Lykes Bros. Steamship Co., Inc., among other United States steamship lines, maintains regular services to these same Italian ports with vessels sailing from the Gulf to such ports each two weeks. (R. 30-31). Thus, had Respondent objected to the agreement in the Petitioner's bills of lading, its shipment could have been made on an American vessel whose bills of lading do not contain such clauses agreeing upon a foreign forum for litigation of disputes arising out of damage to the cargo. In these days of substantial subsidies to American steamship lines, it would seem desirable to help them meet foreign competition by encouraging American citizens to use American ships and thus avoid having to file damage claims in foreign countries while at the same time bolstering our American Merchant Marine.

District Court's discretion or unless it is clearly erroneous.[20] Even the Court of Appeals below would not go so far as to hold that the District Court had abused its discretion in sustaining the reasonableness of the forum agreed upon by the parties or that such holding was clearly erroneous.

The most that can be said in Respondent's favor on this phase of the matter is that there may be some elements present in the case which would make it desirable from Respondent's standpoint for the case to be litigated in the United States. However, if the agreement is not null and void as contrary to public policy as the *Muller*[21] case, *The Geisha* case,[22] and *The Bio Bio* case[23] clearly hold, it is also clear from these three cases that the reasonableness of the agreement is the sole criterion. The fact that Respondent may show some elements which indicate convenience to it of trial at a place other than the agreed upon forum is irrelevant and immaterial in the face of the showing made here that the forum to which the Respondent freely assented is not an unreasonble one. The agreement to adjudicate claims in Genoa was properly enforced by the District Court below where the record before it spoke authoritatively for the reasonableness of the agreement and it is significant to note that nowhere

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[20] "In reviewing a judgment of a trial court sitting without a jury in Admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52 (a) of the Federal Rules of Civil Procedure". **McAllister v. United States**, 348 U.S. 19, 20 (1954).

[21] 224 F. 2d 806 (2 C.A.), cert. denied, 350 U.S. 903 (1955).

[22] 187 F. 2d 990 (2 C.A., 1951).

[23] 227 F. 2d 519 (2 C.A., 1955), aff. 127 F. Supp. 13 (S.D. N.Y. 1955).

in its briefs before the District Court below or the Court of Appeals below was the Respondent ever able to bring itself to make the direct statement that the agreement was, in fact, an unreasonable one. In good conscience it could not make such a statement.

It is clear, therefore, under all of the facts and circumstances of this case, that the District Court below did not abuse its discretion in exercising its basic Admiralty jurisdiction and enforcing the agreement made by Petitioners and Respondent to adjudicate claims for cargo damage such as this in the forum to which they freely agreed.

CLAUSE 27 INCLUDES SUIT IN REM AGAINST THE VESSEL

The second ground relied on by the Court of Appeals below in reversing and remanding this cause to the District Court was its holding that Clause 27 of the Bills of Lading covering the transportation of this cargo did not include *in rem* actions against the vessel itself as well as *in personam* actions against the Petitioner. This holding of the Court of Appeals below in separating the *in rem* and *in personam* nature of relief permits the Respondent to avoid its clear and unambiguous contractual agreement with respect to *in personam* actions under the guise of an independent *in rem* proceeding which thereby abrogates completely the effects of its contractual agreement to adjudicate any claims for cargo damage in Genoa, Italy.

Clause 27 states:

> "Also, that *no legal proceedings may be brought* against the Captain or shipowners or their agents in respect to loss of or damage to any goods herein

> specified, except in Genoa, it being understood and agreed that every other tribunal in the place or places where the goods were shipped or landed is incompetent, *notwithstanding that the ship may be legally represented there.*" (Emphasis supplied)

It is the clear and obvious intent of Clause 27 of the bills of lading to effect a complete jurisdictional agreement regarding any dispute arising out of the loss or damage to the cargo while carried on Petitioner's vessel. Certainly this clause contemplates all claims, suits and causes of action when it refers to legal proceedings for loss or damage and specifically mentions the possibility of the "ship" being legally represented there. Actually it is as least as strong, if not stronger, than the clauses in the three leading cases on this question.

In the *Muller* case, the agreement to adjudicate claims in a foreign country read as follows:

> "'Jurisdiction. Any claim against the *carrier* arising under this bill of lading shall be decided according to Swedish law, except as provided elsewhere herein, and in the Swedish Courts, to the jurisdiction of which the *carrier* submits himself.'"[24]

And in *The Geisha*, the contractual agreement passed upon provided:

> "'Any claim under this bill of lading including *claims* for alleged unseaworthiness . . . to be settled with the *company* in Norway, according to Norwegian law, to the exclusion of proceedings in the courts of any other country . . .'"[25]

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[24] 224 F. 2d 806, at page 807, cert. denied 350 U.S. 903.

[25] 187 F. 2d 990, at page 990.

And finally, in *The Bio Bio*, the clause was:

> "'Any *claims* in connection with the goods carried under the bill of lading must be filed against the *carrier* in the City of Stockholm and settled according to Swedish law . . .'"[26]

Thus, the reference in all three of these cases was either to carrier or company and no specific references were considered necessary by these Courts to the vessel itself, for obviously the clear intent of these jurisdictional agreements is to litigate all legal proceedings, whether *in personam* or *in rem* in the agreed-upon forum.

While, as the Court of Appeals below points out, the *Muller* case[27] apparently did not involve a libel *in rem* because the vessel was lost at sea, the even later decision of the Court of Appeals for the Second Circuit in *The Bio Bio* case involved both a proceeding *in rem* against three vessels and *in personam* against their owners.[28] The agreement in *The Bio Bio* case referred solely to claims against the "carrier" and provided that suits against the carrier could be brought only in the courts of the City of Stockholm, Sweden. A comparison of the agreement in the present case with the agreement in *The Bio Bio* case indi-

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[26] 127 F. Supp. 13, at page 14, affirmed per curiam, 227 F. 2d 519.

[27] 224 F. 2d 806 (2 C.A.), cert. denied 350 U.S. 903 (1955).

[28] The District Court's opinion in the **Bio Bio** case shows clearly that the respondents did not question either **in rem** or **in personam** jurisdiction for it states: "Respondents do not question, upon appearance and oral argument or in brief, the jurisdiction of this court either over their persons . . . or the subject matter of this controversy." 127 F. Supp. 13, at page 14.

cates clearly both clauses were intended to cover legal proceedings of any kind in connection with cargo damage.[29]

Clearly the term "carrier" used in *The Bio Bio* case is a reference to the company owning the vessel, the shipowner, and by definition, a carrier is "a person or corporation undertaking to transport person or property from place to place, by means of conveyance, either gratuitously or for hire".[30]

Nevertheless, even though the clause under interpretation in *The Bio Bio* case made no reference whatsoever to *in personam* or *in rem* actions and did not even mention the vessel or the ship, the Court of Appeals for the Second Circuit correctly interpreted this clause to include any action which might be asserted against the shipowner, whether *in personam* or *in rem*.

Isn't the above quoted definition of a carrier in fact the definition of a shipowner if you change the word "conveyance" in the definition to "ship". The definition of shipowner and carrier for all practical purposes is synonymous under these circumstances. Thus, the Court of Ap-

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[29] In **The Bio Bio** case the agreement was:

"Any claims in connection with the goods carried under the bill of lading must be filed against the carrier in the City of Stockholm and settled according to Swedish law. . . . "

Clause 27 of the bill of lading involved here provided as follows:

"Also, that **no legal proceedings may be brought** against the Captain or shipowners or their agents in respect to loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other tribunal in the place or places where the goods are shipped or landed is incompetent, **notwithstanding that the ship may be legally represented there.**" (Emphasis supplied).

[30] Black's Law Dictionary (3d Ed., 1933).

peals below in narrowly construing Clause 27 of the bills of lading completely ignored the clear and obvious intent of the clause, an intent clearly evident to anyone familiar with the nature of ocean transportation.

The decision of the Court of Appeals below refusing to uphold the agreement of the parties both *in rem* and *in personam*, of necessity divorces entirely one form of proceeding from the other, and in so doing is contrary to the decision of the Court of Appeals for the Third Circuit in *Smith v. The Mormacdale*, 198 F. 2d 849 (3 C.A., 1952), to a decision of the Court of Appeals for the Second Circuit in *Bennett v. SS Mormacteal, et al.*, 254 F. 2d 138 (2 C.A., 1958), (affirming per curiam 160 F. Supp. 840 (E.D.N.Y. 1958, petition for writ of certiorari filed June 11, 1958, No. 1063 and certiorari denied Oct. 13, 1958), and to an earlier decision of its own in *Samuels v. Munson Steamship Line*, 63 F. 2d 861 (1933).[31]

There is no explanation in the opinion by the Court of Appeals below of the basis for their holding that Clause 27 did not encompass all legal proceedings, both against owners of the vessel and against the ship itself. Such a construction

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[31] In these cases, longshoremen had filed actions **in rem** against the vessel only in an attempt to recover compensatory damages from the vessel **in rem**, when they could not recover such damages against the vessel owner **in personam** because the longshoremen were relegated to their rights under the Longshoremen's & Harbor Workers' Compensation Act against their employer, the vessel owner. In these cases, it is held that an action **in rem** against the vessel cannot be maintained since the vessel is not such a separate and independent person from the vessel owner as to make it a legal entity against which the longshoremen's claims can be asserted, because this would permit the longshoremen to recover indirectly compensatory damages from their employer, the vessel owner, when they could not recover them directly from their employer in an **in personam** action.

of this clause for all practical purposes renders it a nullity by interpretation, for to permit Respondent to prosecute its cause of action against the ship *in rem* and on the other hand to uphold the agreement requiring Respondent to sue the shipowner *in personam* in Genoa is simply to permit Respondent to circumvent its agreement by extending the fiction of the separate identity of a vessel to never intended extremes. The existence of an *in rem* action against a vessel itself is merely a security device in a cause of cargo damage by which Respondent became entitled to a seizure of the vessel until adequate security was posted to satisfy its cause of action, wherever it might be prosecuted. There is nothing in the *in rem* seizure device or in Clause 27 which says that the case must be prosecuted in the same jurisdiction where the vessel is seized or subject to seizure. The fact that the right exists at all to pursue the vessel *in rem* is simply to permit Respondent to get its full security and this was accomplished when the District Court below, in granting Petitioner's motion, conditioned the order upon the Petitioner's posting a corporate surety bond to remain in full force and effect should Respondent be successful in obtaining a favorable award in a proceeding in Genoa, Italy, the forum where it had agreed to bring all legal proceedings in respect to loss of or damage to goods covered by the bills of lading.

Since Respondent has the full security demanded by it through the corporate surety bond posted by Petitioners which remains in full force and effect, it has accomplished all that it could hope to do by an action *in rem* against the MONROSA except to evade its contractual agreement to institute any legal proceedings to recover for this cargo loss in Genoa, Italy. All Respondent is trying to do here

is to avoid living up to its contractual agreement, which now appears to it to have been an unwise one.

Clause 27 clearly encompasses all legal proceedings whether *in personam* or *in rem* and the District Court below was correct in so holding.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals should be reversed, and that of the District Court below reinstated, thus requiring Respondent to abide by its contractual agreement by prosecuting the suit now pending in Genoa against Petitioner, if Respondent so desires.

Respectfully submitted,

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